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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184978
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Attachments	Response to Applicant's Objections to Evidence (F0877192).PDF ( 4 pages ) (27795 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

McNEIL-PPC, INC.,

Opposer,

-against-

WALGREEN CO.,

Applicant.

**Opposition No. 91184978**

**OPPOSER'S RESPONSE TO APPLICANT'S  
STATEMENT OF OBJECTIONS TO OPPOSER'S EVIDENCE**

Opposer McNEIL-PPC, Inc. ("McNEIL") herein responds to applicant Walgreen Co.'s ("Walgreens") Statement of Objections to Opposer's Evidence as set forth in Applicant's Response to Opposer's Statement of Objections to Applicant's Evidence and Applicant's Statement of Objections to Opposer's Evidence, dated August 29, 2011 ("App. R&O"). The objections are without basis and should be overruled.

**1. The Woo Declaration Properly Attached Admissible Search Reports Probative of the Fame of the ZYRTEC Mark**

Walgreens' attempt to exclude the Declaration of Giselle Woo and related exhibits ignores the settled rule that printouts of WESTLAW or NEXIS search reports containing article excerpts are admissible since they identify the dates of publication and sources, and since complete reports are publicly available for verification. 37 C.F.R. § 2.122(e). Walgreens objects to these reports on the basis of relevance and authenticity.

As to relevance, search reports "proffered with opposer's notice of reliance to establish the fame of its marks" are sufficient to overcome an objection on the ground of relevance. *Hard Rock Cafe Licensing Corp. v. Elsea*, 48 U.S.P.Q.2d 1400, 1404-05 (T.T.A.B. 1998). Walgreens' objection based on relevance must be overruled because "such evidence is relevant to the renown of opposer's marks." *Id.* at 1404. Moreover, questions as to the probative value of printed

publication and Internet evidence are properly resolved by the Board at the conclusion of the trial. Trademark Trial and Appeal Board Manual of Procedure (“TBMP”) at 704.08.

Walgreens’ objection on the basis of authenticity must also be overruled: “Fed. R. Evid. 902(6) clearly states that printed materials purporting to be newspapers or periodicals are self-authenticating,” and because “it is sufficient that photocopies of excerpted articles contain notations . . . on the copies . . . as to the source and date of the copied articles,” as is done for each excerpt set forth in Opposer’s Exhibits 102-105. *Hard Rock Cafe*, 48 U.S.P.Q.2d at 1405; *Int’l Ass’n of Fire Chiefs, Inc. v. the H. Marvin Ginn Corp.*, 225 U.S.P.Q. 940, 942 n.6 (T.T.A.B. 1985), *rev’d on other grounds*, 228 U.S.P.Q. 528 (Fed. Cir. 1986) (upholding admissibility of NEXIS search reports of article excerpts because the “materials clearly identify the excerpted articles by their dates of publication and sources, all of which are readily available in published materials”); TBMP at 704.08(a) (a notice of reliance on printed publications “may be accompanied by an electronically generated document which is the equivalent of the . . . relevant portion [of the printed publication], as, for example, by a printout from the NEXIS computerized library”); *see also* 37 C.F.R. § 2.122(e). Not surprisingly, Walgreens’ citations in “support” of this objection are unavailing and misleading. Contrary to Walgreens’ description, though *In re Bayer Aktiengesellschaft* states that *Google* search results may be insufficient (the section cited by Walgreens deals exclusively with *Google* search reports and websites cited therein), 82 U.S.P.Q.2d 1828, 1833 (Fed. Cir. 2007), the Board specifically held that excerpts cited in search results from legal databases (such as WESTLAW and NEXIS) are not only admissible and relevant, but “provide substantial evidence to support the Board’s determination.” *Id.* at 1834-35. Walgreens’ other case, *General Motors Corp. v. Artside & Co.*, also deals exclusively with *Google* search result summaries. 87 U.S.P.Q.2d 1179, 1183 (T.T.A.B. 2008).

## **2. Walgreens’ Remaining Evidentiary Objections Have Already Been Overruled by the Board**

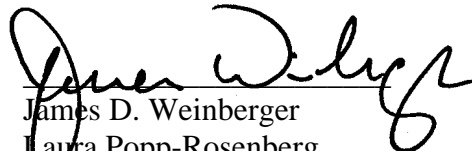
In section II(B) of its Response and Objections, Walgreens objects to certain documentary and testimony evidence on the exact bases set forth in its December 28, 2010

Motion to Preclude Documents from Introduction at Trial, namely that they were produced one day after the end of the discovery period.<sup>1</sup> The Board, of course, rejected those bases in its order entered May 6, 2011, as acknowledged by Walgreens. *See* App. R&O at 18. Walgreens has provided no authority or reason that the result should be different now.

As the Board stated in its May 6 Order, preclusion of documents is not appropriate on the basis that McNEIL “merely produced documents one day after the close of discovery.” Order at 3. McNEIL produced the documents at issue “well in advance of trial,” and “some if not most of the documents at issue were produced to supplement opposer’s production or to respond to a third set of document requests.” *Id.* at 4. Since “discovery responses may be supplemented at any time, even during trial,” Walgreens’ objections based on McNEIL’s production of the documents at issue the day after the discovery period closed must be rejected. *See* Order at 4, citing *Vignette Corp. v. Marino*, 77 U.S.P.Q. 2d 1408 (T.T.A.B. 2005).

Dated: September 13, 2011

Respectfully Submitted,



James D. Weinberger  
Laura Popp-Rosenberg  
Giselle C.W. Huron


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<sup>1</sup> In its motion, Walgreens sought the preclusion of documents with the following Bates ranges: McNEIL 5040-5128, 5133-5161, and 5175-9498. Motion to Preclude at 1. Walgreens has re-asserted its objections to the same documents as grouped in Opposer’s Exhibits 103 (McNEIL 5177-5715), 104 (McNEIL 5716-6159) and 105 (McNEIL 6160-9498), and has included objections to additional Opposer’s Exhibits on the same basis: “that the production of the documents contained in those exhibits occurred after the discovery period closed.” App. R&O at 17.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **Opposer's Response to Applicant's Statement of Objections to Opposer's Evidence** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed to counsel for Walgreen Co., Mark Liss, Esq., Leydig, Voit & Mayer, Ltd., Two Prudential Plaza, 180 N. Stetson Avenue, Suite 4900, Chicago, IL 60601, this 13<sup>th</sup> day of September, 2011.

  
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Giselle C.W. Huron